

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1234

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To Be Argued By:

JOSEPH BEELER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1234

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

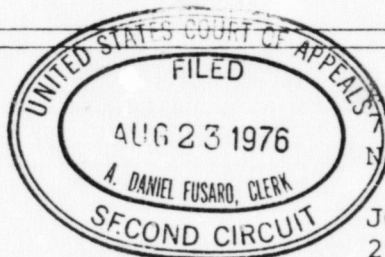
v.

FRANCOIS ROSSI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

APPENDIX FOR APPELLANT



Of Counsel:

DONNA R. BLAUSTEIN
1753 Alton Road
Miami Beach, Florida 33139

ALBERT J. KRIEGER
745 Fifth Avenue
New York, New York 10022

JOSEPH BEELER
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Miami, Florida 33133

Attorneys for
Defendant-Appellant

PAGINATION AS IN ORIGINAL COPY

73 CR 164

7374-9

WEINSTEIN J. FLANN, J.

TITLE OF CASE

THE UNITED STATES

vs.

FRANCOIS ROSSI, a/k/a "Marcello"

PAUL PAGANACCI

MIGUEL RUSSO

FRANCOIS CHIAPPE

ELIO PAOLO GIGANTE

MARTINO WARDEN

FELICE BORETTI

CESAR MELCHIOLE and

JOHN DOE, a/k/a "Dino"

ATTORNEYS

For U.S.: FRIED

for deft. CHIAPPE:

Joseph Gino Gallina
30 Broad St., NYC.

425-1060

RUSSO-Nancy Rosner 401 Broad-
way N.Y. 925-6844

For Defendant: ROSSI:

Albort Krieger 745-5762

401 Broadway, N.Y.C.

925-5937

Did import heroin into the U.S.

ABSTRACT OF COSTS	AMOUNT	DATE	CASH RECEIVED AND DISBURSED		RECEIVED	DISBURSED
			NAME			
Fine, (Rossi)	2000.00	5-17-76	Albort Krieger		2	
Clerk,		5-17-76	R. Rosner			2
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						

DATE	PROCEEDINGS
2-15-73	Before WEINSTEIN J - Indictment filed and ordered sealed by the Court. Bench Warrants Ordered for all defts. Bench Warr
2-16-73	Bench Warrants Issued.
2-16-73	By MISHLER, CH J - Ordered that the above captioned indictment be opened by the Court for the limited purpose of reproducing as many copies of the indictment as are necessary for extradition proceedings concerning fugitives named as defts. therein and it is further Ordered that, after the above reproduction has been completed, the Indictment be resealed and not made public (except in connection with extradition proceedings)
2-23-73	Grand Jury Minutes of Feb. 15, 1973 filed.
2-23-73	Affidavits of MICHEL X SIMON X NICOLA X filed. Two Affidavits filed.
2-23-73	Affidavits of MICHEL X SIMON X NICOLA X filed.

BEST COPY AVAILABLE

73CR. 164

DATE	PROCEEDINGS
2-23-73	Bench Warrant ret'd and filed unexecuted (unexecuted)
3-8-73	Four Affidavits, 2 Bench Warrants (unexecuted) placed in sealed vault.
3-27-73	Three Affidavits filed. Placed in sealed vault.
7/10/75	Before MISHLER, CH.J.- Case called- Deft FRANCOIS ROSSI produced in Court on Bench warrant-Interpreter present- Indictment ordered unsealed-Deft to retain counsel-Bail set at \$5,000.00- court advised deft of his rights- Pleading set for 7/18/75 at 11:00 A.M.
7-16-75	Notice of Appearance filed as to deft FRANCISCO ROSSI.
7-16-75	Letter filed received from Chambers re deft ROSSI(undated)
7-16-75	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert Krieger present - deft arraigned and enters a plea of not guilty on all 4 indictments(73 CR-164; 73 CR-195;73 CR 239 and 72 CR-1162. Case set down for July 31, 1975 at 9:30 am to set a date for trial. 3 Affidavits marked Govts. Ex. 1, 2, & 3 for Identification in this case. Interpreter Albert Boyne present.
7-31-75	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert J. Krieger present - Interpreter L.Clancy present - deft waived rights to a speedy trial - case set down for trial on Jan. 5, 1976.
8/4/75	Certificate of engagement filed
8-15-75	Before MISHLER, CH J - On motion of Asst. U.S. Atty. Puccio indictment ordered unsealed - further, any relating documents sealed and placed in court safe are to be unsealed and filed and placed in respective file. (see 73 CR-1162, 73 CR 239 and 73 CR 195)
822-75	Bench Warrant (ARCANO) Affidavit of MICHELE SIMONE NICOLI and Affidavit of VICTOR J. ROCCO filed.
9/2/75	Stenographers Transcript dated 7/16/75 filed
9-12-75	Notice of Motion filed & affidavit, for an order modifying bail and bail conditions presently existing etc.(deft FRANCOIS ROSSI, ret.9-19-75 at 9:30 am)
19/75	Before MISHLER, CH.J.- Case called- Motion withdrawn (Deft's motion for an order modifying the bail and bail conditions presently existing, etc.) F. ROSSI
11/3/75	Stenographers Transcript dated 10/10/75 filed
12/8/75	Petition for writ of prohibition, etc. filed
-5-76	Before MISHLER, CH J - case called - deft Rossi & counsel Albert Krieger present - Interpreter M.Mensa present. Interpreter L.Clancy present - trial ordered and begun - Jurors selected and sworn -Interpreter Maria Elana Cardenas present - Trial contd to Jan. 6, 1976 at 10:00 am.

CRIMINAL DOCKET

DATE	PROCEEDINGS
1-6-76	Before MISHLER, CH J - case called - deft Rossi & counsel Albert Krieger present - Interpreter Maria Cardenas present - trial resumed - Trial contd to Jan. 7, 1976.
1-7-76	Before MISHLER, CH J - case called - deft ROSSI & counsel present - Interpreter Maria Cardenas present - trial resumed - trial contd to Jan. 8, 1976.
1-8-76	Before MISHLER, CH J - case called - deft Rossi & atty present - Interpreter M.Cardenas & M.Mensa present - trial resumed - Trial contd to 1-12-76.
1-12-76	Before MISHLER, CH J - case called - deft Rossi & counsel present - trial resumed - Interpreter M.Cardenas present - Govt rests - motion by deft for Judgment of Acquittal is denied - deft rests - trial contd to Jan. 13, 1976.
1-13-76	Before MISHLER, CH J - case called - deft & counsel present - Interpreter M.Cardenas present - trial resumed - motion by deft for mistrial is denied - trial contd to Jan. 14, 1976
1-13-76	By MISHLER, CH J - Order of sustenance signed (Lunch)
1-14-76	6 stenographers transcripts filed (pgs 1 to 927)
1-14-76	Before MISHLER, CH J - case called - deft Rossi & counsel A.J.Kringer present - Interpreter M.Cardenas present - trial resumed - At 11:10 AM the jury retired for deliberations - Jury returns with a verdict of guilty at 4:10 PM - Jury polled and Jury discharged - all motions reserved until time of sentence - sentence adjd without date - trial concluded.
1-14-76	By MISHLER, CH J - Two Orders of sustenance filed (lunch & coffee etc)
1-15-76	Stenographers transcript filed dated Jan. 14, 1976
3-19-76	Before Mishler, Ch J - case called - sentence adjd to 4-5-76 at 9:30 am on consent (Rossi)
4-5-76	Before Mishler, Ch J - case called - sentence adjd to 4-27-76 at 9:30 am (Rossi)
4-27-76	Before MISHLER, CH J - case called - sentence as to deft ROSSI adjd to May 12, 1976 at 9:30 am.
5-12-76	Before MISHLER, CH J - case called - deft ROSSI & counsel Albert Krieger present - Interpreter L.Clancy present - deft sentenced to a term of imprisonment of 20 years and a fine of \$20,000 - sentence to be computed from Feb. 9, 1973 - Clerk to file Notice of Appeal.
5-12-76	Judgment & Commitment filed - certified copies to Marshal (ROSSI)

DATE	PROCEEDINGS
5-12-76	Notice of appeal filed. (ROSSI)
5-12-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of appeals
5-14-76	Judgment & commitment ret'd and filed - deft. del. to MCC, NY
5-21-76	Order received from the Court of Appeals that the Index to record be docketed on or before June 14, 1976 (ROSSI)
5/27/76	Before MISHLER, CH. J. - Case called - defts RUSSO and CHIAPPE present without counsel - interpreter present - court to appoint counsel bail set at \$2500.00 as to each deft (surety Co. bond) - bail to cover this case adn 73CR239 - arraignment set down for 6/4/76 - trial set for 6/28/76
5/27/76	Financial affidavits filed (both defts)
6/1/76	Letters from Judge Mishler to deft Russo and Chiappe dated 5/28/76 filed
6-1-76	Notice of appearance filed (Francois Chiappe)
6-2-76	Stenographers transcript filed dated May 12, 1976
6/3/76	Letter from Gino Gallina dated 6/1/76 filed
6/4/76	Before MISHLER, CH. J. - Case called - defts and counsel present - interpreter sworn - defts arraigned and each enter plea of not guilty - trial set for 6/28/76 (CHIAPPE and RUSSO)
6/4/76	Notices of appearances file (both defts)
6/7/76	Record on appeal certified and mailed to court of appeals (ROSSI)
6/10/76	Acknowledgment received from court of appeals for receipt of record
6/11/76	Letter from Gino Gallina dated 6/7/76 filed
6-14-76	Stenographers transcript filed dated May 27, 1976.
6-14-76	Before MISHLER, CH J - case called - defts Russo & Chiappe & counsel present - motion argued by the Govt to adjourn the trial date of June 28, 1976; motion denied as indicated on the record.
6-15-76	Judgment & commitment ret'd and filed - Deft ROSSI delivered to U.S.P. Marion, Ill.
6-17-76	Stenographers transcript dated June 4, 1976 filed (RUSSO & CHIAPPE)
6-22-76	Affidavit of GINO GALLINA and unsigned order filed received from Chambers and placed in this file.
6-23-76	Before MISHLER, CH J - case called - motion for discovery argued - Govt consented to turn over discovery as indicated on the record (Russo)
6-24-76	Copy of letter from Judge Mishler dtd 6-23-76 with annexed letter from Albert Krieger dtd 6-23-76 filed.
6-24-76	Copy of letter from Judge Mishler to Warden Taylor dtd 6-22-76 filed.

CRIMINAL DOCKET

DATE	PROCEEDINGS
6-25-76	Notice of motion filed, ret. June 28, 1976, for for adjournment of trial etc. (this motion adjd to Oct. 4, 1976)
6-28-76	Before MISHLER, CH J - case called - adjd without date for trial - deft Chiappe ill - possible severance from trial.
6-29-76	stenographers transcript filed dated June 28, 1976
6-30-76	Stenographers transcript filed dated June 29, 1976
7-6-76	Letter from Larry F Taylor dtd 6-28-76 filed.
7/7/76	Before PLATT, J. - Case called- deft and counsel present- interpreter sworn- deft's motion to suppress- decision reserved- jurors selected and sworn-deft's motion for an order supplying daily transcript granted trial contd to 7/8/76 (RUSSO)
7-8-76	Order appointing counsel filed.
7-8-76	Before MISHLER, CH. J. - Case called. All defts & counsel present. Trial resumed. Immunity order signed by the Court. The witness Richard Bacetta refused to answer any questions put before him and the Court held him in contempt of court. Witness Richard Bacetta sentenced to imprisonment for a period of 6 months or until verdict of the case or trial, whichever comes first. Execution of sentence is stayed until 7-9-76 by 2 P.M. Trial continued to 7-9-76 at 10 A.M.
7-9-76	Before PLATT, J. - Case called. deft & counsel present. Jury retires for deliberations at 10:40 a.m. Jury is excused by the court at 5:50 p.m. to continue deliberations on 7-12/76 at 10:00 a.m. (RUSSO)
7-12-76	Before MISHLER, CH J - case called - deft & counsel present 0 (Miguel Russo) trial contd - jury resumes deliberations - court declares a mistrial - The Jury is excused with the thanks of the court.
7-13-76	By Platt, J - 2 orders of sustenance filed (July 9 and July 12 Lunch)
7-13-76	Before MISHLER, CH J - case called motion by deft RUSSO for a speedy trial and for reduction of bail adjd to July 6, 1976.
7-16-76	Before MISHLER, CH J - case called- 8-5-76 for trial (RUSSO)
7-20-76	Voucher for compensation for expert services filed (RUSSO)
7/20/76	Voucher for compensation for expert services filed. (RUSSO)
7/22/76	Stenographers transcript dtd 7/9/76 filed. (RUSSO)
8-6-76	Before MISHLER, CH J - case called - deft Russo & counsel present- Interpreter L. Clancy present - deft Chiappe not present with counsel - Nov. 15, 1976 for trial. RUSSO & CHIAPPE code I start 8-16-76 limited to 11-15-76

DATE

PROCEEDINGS

9-76 Certificate of engagement filed setting case for trial Nov. 15, 1976.

1 THE COURT: No, I want to know what other
2 requests to charge.

3 MR. KRIEGER: The only other request --
4 I tried to find some law on it, I was unsuccessful --
5 was, as I indicated to the Court, that the jury is
6 free to draw whatever inferences they choose to
7 draw from the evidence they have heard here in
8 this court.

9 THE COURT: Seat the jury. We're ready.

10 MR. KRIEGER: Is your Honor going to
11 include in your charge the usual remark to the
12 effect that they are the finders of the facts
13 and any comment you have made on the evidence,
14 et cetera?

15 THE COURT: Exactly.

16 Seat the jury.

17 (The jury enters the jury box.)

18 THE COURT: Good morning, ladies and
19 gentlemen.

20 We have arrived at the point in the trial
21 where I'm obligated to instruct you on the
22 applicable law. A good starting point is to
23 instruct you on the role that the various parti-
24 cipants in a trial play.

25 First we have the lawyers, who are

Charge of the Court

adversaries. In fact, the trial is called an adversary proceeding, as distinguished from an accusatory proceeding which is prevalent under civil law in Europe. Lawyers represent clients, and they take opposing views on the issues of fact. It's the duty of lawyers to develop the evidence during the trial. You recognize that the lawyers are partial, they are partisan, and they represent a particular point of view.

On the other hand, the Court and the jury are impartial and objective. We're here to judge the case impartially--the jury to judge the facts--and the jury and the jury alone judges the facts. That means that you decide what happened in this case. The Court, on the other hand, is the sole judge of the law.

The rulings that I made during the trial are rulings made as the judge of the law. They are accepted by the lawyers. They had to be. It was their duty to accept the rulings of the Court. So it's the jury's duty to accept the law as the Court charges it. You may not be happy with the principles; you may think that they

Charge of the Court

work an unfair result in certain cases, but it is your absolute duty to accept it. It's very important that the law be universally applied. It would be chaotic if the jury just decided that they'd devise their own set of laws and rules and guides. That's why we have a clear demarcation of authority between law and facts: the jury the sole judge of the facts, the Court the sole judge of the law.

I have an obligation to accept your findings. I have no right to dispute them, that is, on issues of fact. You, on the other hand, have no right to dispute the law as I charge it. If we clearly understand the duties, the authority and the obligations of the various participants in a trial, we take a long step in providing a forum for a fair trial.

The first well-known principle, time-honored in American jurisprudence, is a presumption of innocence. The defendant is presumed to be innocent of the crime charged in the indictment. That means that you must conclude at the outset of the trial that the defendant is innocent of the crime charged. That presumption

Charge of the Court

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2 is strong enough to acquit a defendant. The
3 presumption is overcome only if the Government
4 proves the guilt of the defendant by proof
5 beyond a reasonable doubt. So that your precise
6 function is to determine not whether the defend-
7 ant is actually guilty of the crime charged, but
8 to determine whether the Government proved -- and
9 I underscore "proved" -- the guilt of the defendant
10 by proof beyond a reasonable doubt.

11 A reasonable doubt is a doubt which a
12 reasonable person has after weighing all the
13 evidence. It's a doubt based on reason and common
14 sense and the state of the record, which means
15 all the evidence in the case, as distinguished from
16 a doubt based on emotion, as arises from a dis-
17 taste to perform an unpleasant task, or a doubt
18 based on pure whim or speculation. A reasonable
19 doubt is not a vague or imaginary doubt. A reason-
20 able doubt is a kind of doubt that would make a
21 reasonable person hesitate to act in a matter of
22 importance to himself or herself.

23 Proof beyond a reasonable doubt is,
24 therefore, proof of such a convincing character
25 that you would be willing to rely and act upon it

Charge of the Court

unhesitatingly in the most important of your own affairs. The Government's burden is not to prove the guilt of the defendant beyond all possible doubt. The Government's burden is heavy. It's to prove the guilt of the defendant beyond a reasonable doubt.

The Government need not prove to you that every bit of evidence offered to you is true beyond a reasonable doubt. The Government must prove to you all the essential elements of the crime charged beyond a reasonable doubt. Later in the charge I'll list for you the essential elements of the crime charged in this case.

The defendant does not have the burden of offering any evidence or of proving anything. The defendant has a right to rely on the failure of the Government to bear its burden of proof.

Evidence is the method employed by the law to prove or disprove a fact. Evidence is generally classified into direct evidence and indirect or circumstantial evidence.

Direct evidence is testimony of what a particular witness saw or heard. Indirect or circumstantial evidence is a method of proving

Charge of the Court

or disproving a fact by drawing reasonable inferences based on common sense and experience from the facts established.

An example, I think, would demonstrate what we're talking about. If you were sitting here as a jury in a civil case, and the principle is the same in a civil case -- and A sued B, for example, for personal injury sustained when plaintiff's car struck and knocked down A while A was crossing the street, if my courtroom deputy, Mr. Adler and myself were standing on the corner and let's assume there were stop signs erected at the corner, and let's assume the plaintiff claimed that the defendant failed to stop at the stop sign and then struck her. Let's assume that I was talking to Mr. Adler and facing the roadway so that the stop sign was in my direct vision, while he had his back to it. If I were called to the witness stand, I would give direct evidence as to the disputed fact, and in making the determination, you must first identify the disputed fact.

I might testify I was talking with Mr. Adler. As I turned to my left I noticed the

Charge of the Court

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2 defendant's motor vehicle and I might describe it
3 as a 1976 white Cadillac, driving at about 60 miles
4 an hour, proceeded at the same rate of speed, passed
5 the stop sign and struck the plaintiff A. Now,
6 that is direct evidence of that disputed issue,
7 passing the stop sign, the plaintiff alleging
8 the defendant passed the stop sign, the defendant
9 denying it.

10 Now, Mr. Adler could not have given direct
11 evidence on that issue because he had his back to
12 the stop sign. He did not see the actual event,
13 but he could testify to the surrounding circumstances.
14 He might testify, for example, as he was talking
15 with me he turned to his right, saw the car
16 coming down, came within his peripheral vision,
17 white Cadillac traveling about sixty miles an hour.
18 He lost sight of it as it passed behind him. It
19 traveled about one hundred feet. It took about
20 two or three or four seconds and he turned to his
21 left and he saw the car traveling at the same
22 rate of speed, struck the plaintiff and knocked her
23 down. Now, there is circumstantial evidence on
24 that same disputed issue. From the circumstances
25 established, a motor vehicle traveling at about

Charge of the Court

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2 sixty miles an hour, traversing about one hundred
3 feet in two or three seconds, I think, based on
4 good common sense and experience the jury would
5 draw the conclusion that that motor vehicle passed
6 the stop sign without stopping.

7 The law doesn't hold that one type of evi-
8 dence is better than another. At times, circum-
9 stantial evidence is more reliable. The law only
10 requires that the Government prove the guilt of
11 the defendant by proof beyond a reasonable doubt
12 based on all the evidence, both direct and cir-
13 cumstantial.

14 What is the evidence of the case? First,
15 it's the sworn testimony of witnesses. Second,
16 exhibits received in evidence, regardless of who
17 may have produced them. At times you may have
18 noticed that documents were marked for identifica-
19 tio . That's simply to identify what the witness said
20 with relation to the document when the witness refers
21 to a document. That's so that someone reading the
22 record might want to inquire as to what document
23 the witness saw, but it's not in evidence. During
24 your deliberations you may only have, if you request,
25 those documents that are actually marked in evidence.

Charge of the Court

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2 There are facts which were stipulated.
3 For example, the defendant stipulated that if
4 certain witnesses were called they would testify
5 that certain documents were made in the regular
6 course of the business of the particular business.
7 In this case, as I recall it, it was hotels.

8 Facts which the Court judicially noticed --
9 I don't recall the specific facts -- but if I noticed,
10 for example, that a certain day of the year and
11 month fell on a certain day of the week,
12 that would be a fact judicially noticed. All that
13 is the record, and from that and the fair and
14 reasonable inferences which you draw from the
15 established facts is the basis of your ultimate
16 decision as to what happened, and having made the
17 finding of fact, then your decision of the guilt
18 or innocence of this defendant will be made in
19 accordance with the law as I charge you.

20 I think it's helpful to know what is not
21 evidence. The statements made by counsel in both
22 opening and closing remarks are not evidence.
23 They serve a very useful function. The lawyers
24 appeared before you at the outset of the trial and
25 told you what their positions were. That was

Charge of the Court

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2 designed to alert you to the evidence that was
3 to follow, to make it easier to follow.
4 Evidence doesn't always come in in chronological
5 order or any other logical order. So it is
6 expected that the statement by the plaintiff's
7 counsel and defendant's counsel would help you
8 follow it as it came in.

9 On the other hand, the closing statements
10 were arguments made by counsel based on the
11 evidence, the defendant arguing theories of
12 exculpability, which means showing the Government
13 failed to prove the guilt of the defendant; the
14 Government, on the other hand, arguing theories
15 of inculpability, theories of guilt based on
16 the evidence, but what they said is not evidence.

17 Any statement made by the Court is not
18 evidence.

19 I have no special role with regard to the
20 facts in this case because I sit here as a judge
21 of the trial. That is your function and yours
22 alone. If I made a statement or said something,
23 it was not intended -- I don't recall making
24 any statement, frankly -- but in case I did, it
25 was not intended to signal anything to you. I have

Charge of the Court

no opinion one way or the other on the guilt or innocence of this defendant. That's up to you.

Evidence stricken from the record is not before you; just as I directed the reporter to physically strike it from his notes, so you're to strike it from your recollection.

At times objections were sustained to questions. You may not speculate on what the answer might have been had the witness been permitted to answer; on the same theory, the witness did not answer and it is not in the record. You must disregard it.

I might say that there were remarkably few objections, but if lawyers did make objection, you must understand that that's their role in protecting the rights of their clients.

I used the term "inference," and I used the word "presumption." There's a difference. An inference is a conclusion which the jury may make based on reason and common sense. The example is the inference that the jury may make in proving a fact from established facts.

A presumption, on the other hand, is a conclusion which the law requires the jury to

Charge of the Court

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2 make and continues so long as it is not overcome
3 by proof beyond a reasonable doubt to the contrary.
4 The example of that, of course, is the presumption
5 of innocence.

6 You jurors are the sole judges of the credi-
7 bility of the witnesses, which means the believabil-
8 ity of their testimony and the weight their testimony
9 deserves. Scrutinize the testimony given and
10 the circumstances under which each witness testified
11 and every matter in evidence which tends to show
12 whether a witness is worthy of belief. Consider
13 the witness's intelligence. Consider his motive
14 and state of mind while on the witness stand
15 testifying before you.

16 Michel Nicoli testified that he participated
17 in the crime charged. You have the right to
18 suspect the testimony of a participant in a crime
19 charged if you find that he has a personal stake
20 in the outcome of the trial or if you find he
21 believes that the rewards promised depend upon the
22 outcome of the trial. Nicoli as a participant in
23 the crime is not incompetent to testify because of
24 that participation. On the contrary, the testimony
25 of a participant alone, if believed by the jury

Charge of the Court

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2 to be true beyond a reasonable doubt, is of
3 sufficient weight to sustain a verdict of guilty
4 even though not corroborated or supported by
5 other evidence in the case. The jury should
6 bear in mind that the testimony of an accomplice
7 is always to be received with caution and weighed
8 with care. You should never convict a defendant
9 on the unsupported testimony of a participant in
10 the crime unless you believe that testimony to be
11 true beyond a reasonable doubt.

12 Take into consideration also the demeanor and
13 manner of the witness on the witness stand. Did
14 the witness seem to you to be honest, frank, forth-
15 right? Did he answer the questions fully? Did he
16 answer them to the best of his ability, to the
17 best of his recollection? Was he evasive? Did
18 you get the impression that when he was testifying
19 before you he was not giving you the benefit of
20 everything he recollected?

21 Take into consideration the witness's own
22 ability to observe the matters as to which he has
23 testified, whether he impressed you as having an
24 accurate recollection of these matters. Take into
25 consideration the relation the witnesses bear to

Charge of the Court

1
2 the case, the manner in which the witness might
3 be affected by the outcome of the case.

4 Take into consideration the extent to
5 which, if any, the witness is either corroborated
6 or contradicted. In this regard, as an example,
7 the defendant argued that the witness Maniero,
8 who is presented to you as a forger of documents,
9 testified that Nicoli supplied the name Miguel
10 DoSantos, while Nicoli testified that Miguel, the
11 name Miguel DiSantos, was supplied by Maniero.
12 You decide, based on your good common sense and
13 experience, whether that was an intentional
14 inconsistency between the testimony, whether it
15 was based on the best recollection and possibly
16 faulty recollection or whether it indicates
17 that the witnesses are not worthy of belief. You
18 must use your good common sense and experience.
19 That's the best tool you have in making these
20 assessments.

21 If a witness is shown to have knowingly
22 and intentionally testified before you falsely as
23 to a material fact, then you have the right to
24 disregard all that witness's testimony on the
25 theory he's unworthy of belief. On the other hand,

Charge of the Court

2 you have the right to accept so much of the testimony
3 as you recognize as believable. Again, it's a com-
4 mon sense principle, and it underscores the wide
5 discretion that the jury has in assessing the
6 credibility of the various witnesses.

7 The defendant argued Nicoli made certain
8 statements to special agents of the Drug Enforcement
9 Administration soon after the arrest in which he
10 lied about participants in narcotics transactions;
11 that he gave names of deceased persons, and in
12 one case I recall, fictitious persons. I think
13 two instances were cited. The defendant also
14 argued that he failed to give certain testimony
15 or describe certain events to which he testified
16 before you at the trial. Those are arguments made
17 challenging the credibility of the witness Nicoli.
18 It is called impeaching testimony. Again you must
19 use your good common sense and experience. Take
20 into consideration the circumstances under which
21 the statements were made to the agents. Take into
22 consideration the testimony he gave on the stand
23 in explanation of the lies he intentionally uttered
24 to the DEA agents. Decide whether the statements
25 he gave are inconsistent with the testimony he gave.

Charge of the Court

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2 In the one instance where he said he lied, it was
3 obviously inconsistent, but on other matters you
4 make that determination.

5 Decide whether it's inconsistent as to a material
6 or immaterial fact. Decide whether the inconsistent
7 statements were intentional lies or whether they
8 were the result of common, human failing in recol-
9 lection. After you think about it and make
10 these decisions, decide how it affects the credi-
11 bility of the witness or witnesses who testified
12 before you.

13 Both the witnesses Maniero and Nicoli testi-
14 fied that they were convicted of a felony, that is
15 a crime punishable by imprisonment for a term of
16 years. The prior conviction does not render a
17 witness incompetent to testify, but it is merely
18 a circumstance which you may consider in determin-
19 ing the credibility of the witness.

20 It's the province of the jury alone to
21 determine the weight to be given any prior con-
22 viction as impeaching testimony.

23 The law does not compel a defendant in a
24 criminal case to take the witness stand and testify.
25 No presumption of guilt may be raised, and no

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1
2 unfavorable inference of any kind may be drawn
3 from the failure of the defendant to testify.
4 A defendant, as previously charged, may rely upon
5 the failure of the Government to prove its case.
6 It would be improper for you to discuss the failure
7 of the defendant to testify during your deliberations.

8 Turning to the indictment, the indictment
9 charges as follows:

10 "From on or about the 1st day of January
11 1965, and continuously thereafter up to and includ-
12 ing the date of the filing of this indictment,
13 within the Eastern District of New York, and else-
14 where, Francois Rossi, also known as 'Marcello,'
15 Paul Paganacci, Francois Chiappe, Miguel Russo,
16 Elio Paolo Gigante, Mariano Warden, Felice Bonetti,
17 Cesar Melchiorre, and John Doe, also known as 'Dino,'
18 the defendants, together with Michel Simon Nicoli,
19 named herein as a co-conspirator but not as a
20 defendant, and others known and unknown to the
21 grand jury, unlawfully, willfully and knowingly
22 did combine, conspire, confederate and agree
23 together and with each other to violate prior to
24 May 1, 1971 Sections 173 and 174 of Title 21,
25 United States Code.

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2 "1. It was part of said conspiracy that
3 prior to May 1, 1971 the defendants fraudulently
4 and knowingly would import and bring into the
5 United States large amounts of heroin, a narcotic
6 drug, contrary to law.

7
8 2. It was further a part of said conspiracy
9 that prior to May 1, 1971 the defendants unlawfully,
10 willfully and knowingly would receive, conceal, buy,
11 sell and facilitate the transportation, concealment
12 and sale of large amounts of heroin, a narcotic
13 drug, after the narcotic drug had been imported
14 and brought into the United States, knowing the
15 same to have been imported and brought into the
16 United States contrary to law.

17 "3. It was further a part of said conspiracy
18 that the defendants would conceal the existence of
19 the conspiracy and would take steps designed to
20 prevent disclosure of their activities."

21 The charge is based on Title 21, United
22 States Code, Sections 173 and 174. It is the
23 Congress that determines the crime. Congress
24 defines the crime through statute. Section 173
25 makes it unlawful to import any narcotic drug into
the United States or any territory except for very

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limited exceptions which are not pertinent here, and I will not bore you with them.

Section 174 specifically makes it a crime to import a narcotic drug, substantially in this language: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law" commits the crime. The defendant is not charged with the importation. That's called the substantive crime, the act. The charge here is entering into an agreement which in legal description is called a conspiracy. The crime is briefly described in this same section by the phrase, "or conspiring to commit any of such acts in violation of laws of the United States," commits the crime.

I charge you that heroin is a narcotic drug. A narcotic drug is defined under another section, 26 U.S.C. Section 2238(g), as opium or any derivative of opium, and heroin is a derivative of opium.

What is a conspiracy? A conspiracy is a combination of two or more persons, by concerted action, to accomplish an unlawful purpose. A conspiracy has been described as a kind of partnership in criminal purposes in which each member becomes

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2 an agent of every other member. It's analogized
3 to a legitimate partnership in which one partner is
4 responsible for whatever any other partner does
5 in the course of the partnership and for the partner-
6 ship purposes and during the term of the partnership.
7 The gist of the offense is the agreement, the under-
8 standing to disobey and disregard the law.

9 The evidence in the case need not show that
10 the members of the conspiracy entered into any
11 formal agreement or that they directly, by words
12 spoken, sat down and stated between themselves
13 what the object and purposes of the criminal venture
14 would be.

15 What the evidence in the case must show
16 beyond a reasonable doubt, in order to establish
17 proof that a conspiracy existed, is that the members
18 in some way or in some manner or through some
19 contrivance positively or tacitly came to a mutual
20 understanding to try to accomplish a common and
21 unlawful plan.

22 The case must establish beyond a reasonable
23 doubt that the alleged conspiracy was knowingly
24 formed, in other words, that the participants were
25

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1
2 aware, in this case that they were dealing in
3 heroin and that one or more of the methods for
4 carrying out the plan were accomplished as charged
5 in the indictment, and that the defendant, the
6 accused, was one of two or more persons who were
7 members of the conspiracy.

8 Before the jury may find that the defendant
9 or any other person has become a member of the
10 conspiracy, the evidence in the case must show
11 beyond a reasonable doubt that the defendant or
12 the person charged with being a member of the con-
13 spiracy knowingly and willfully participated in
14 the unlawful plan with the intent to advance the
15 object or purpose of the conspiracy, in this case,
16 to help the narcotics business along, the heroin
17 business along.

18 By "knowingly," we mean that the defendant or
19 any other person charged to be a member of the
20 conspiracy was aware that they were getting to-
21 gether for the heroin business, that it just wasn't
22 an innocent or inadvertent act, and that it was
23 willfully done, which means it was done voluntarily,
24 intentionally, understanding it was a violation
25 of law to perform the act.

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2 In determining whether the accused became
3 a member of the conspiracy, you must determine from
4 testimony as to what the defendant said or did.
5 It can't be on testimony of what somebody else
6 said the defendant did. That might be slightly
7 confusing.

8 Criminal liability is something personal,
9 individual. It must be based on the acts or
10 declarations, statements, of the defendant in
11 order to bring him into the conspiracy. It must
12 be shown that what he did was knowingly and will-
13 fully done and that he performed the acts, that
14 he made the declarations and it must be by testimony
15 of what the defendant said or did.

16 The only testimony we have in this case,
17 of course, is that of Mr. Nicoli.

18 I charged you during the trial that the
19 accused, the defendant, may be bound by statements
20 or acts of others, even though he wasn't present,
21 even though there's no proof that he knew that it
22 was being done. I also told you that you should
23 keep the evidence aside to first determine whether
24 the Government proved beyond a reasonable doubt
25 that this defendant entered into the conspiracy;

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2 so that's the first finding you must make. That's
3 the question of criminal liability. The other is
4 one of evidence: what you can charge the defendant
5 with.

6 I told you during the trial that the defend-
7 ant may not be charged with conversations which
8 Mr. Nicoli said he had with Mr. Chiappe outside
9 the presence of this defendant because it's not
10 the defendant's declaration, not the defendant's
11 action; however, coming back to the theory of
12 agency, once he is proved to be a member of
13 that business, of that conspiracy, then he's
14 chargeable with anything that a co-conspirator
15 says or does during the term of the conspiracy
16 and in furtherance of the objective of the
17 conspiracy.

18 In order to sustain its burden of proof,
19 the Government must prove beyond a reasonable
20 doubt (1) that the conspiracy described in the
21 indictment was knowingly and willfully formed and
22 existing at or about the time alleged, for the
23 purposes alleged;

24 (2) that the accused knowingly and willfully
became a member of the conspiracy, in other words,

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2 thr was aware that he was entering into the
3 heroin business and that he did it voluntarily
4 and that his participation was intentional,
5 knowing it was a violation of law;

6 (3) that one of the conspirators thereafter
7 knowingly committed an overt act. In other words,
8 the Government must prove beyond a reasonable
9 doubt that one of the conspirators did something
10 knowingly, that he was aware of what he was doing,
11 to further the heroin business that's charged
12 as the crime in this indictment;

13 (4) that such overt act was knowingly
14 done in furtherance of the object or purpose of
15 the conspiracy.

16 The Government must prove all those
17 essential elements of the crime charged. If the
18 Government fails, then you have the obligation of
19 finding the defendant not guilty.

20 On the other hand, if the Government proves
21 beyond a reasonable doubt the existence of the
22 conspiracy charged and that it was knowingly
23 formed for the purposes alleged, (2) that the
24 defendant knowingly and willfully entered into
25 the conspiracy, (3) that an overt act was knowingly

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1
2 performed by one of the conspirators, and (4)
3 that the overt act furthered the purposes of the
4 heroin business charged in the conspiracy, then
5 you have the obligation of finding the defendant
6 guilty as charged.

7 Each juror must decide the case for himself
8 and herself based on the evidence. The jury
9 possesses a deliberative process, one of exchange
10 of ideas, discussion of the evidence. It's
11 improper for any juror to enter the jury room and
12 in effect abandon his obligation, saying to his
13 fellow jurors or saying to her fellow jurors, "Well,
14 I don't care one way or the other, I'll go along
15 with the majority." That obviously is wrong. It's
16 just as wrong for a juror to take an obdurate
17 or intransigent position and say to the fellow
18 jurors, "Now, look, I don't care what you say
19 about it. This is the way I feel. When the
20 other eleven jurors are ready to agree with me,
21 we'll have a verdict."

22 During your deliberations you may come to
23 a tentative verdict one way or the other and on
24 further discussion it may make sense to you,
25 based on, again, the evidence in the case, that you

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1
2 were wrong in the first instance. Nothing wrong
3 with giving up a tentative verdict when you
4 recognize that the alternate verdict makes more
5 sense, based on the evidence in the case.

6 The verdict must be unanimous, the theory
7 being that we have twelve separate individual
8 verdicts, all agreeing to the verdict.

9 During your deliberations you will have
10 occasion to communicate with the Court through your
11 forelady. You might want to ask that testimony
12 be read. You might want exhibits. I will send
13 only the exhibits that you ask for. If you want
14 all the exhibits, say all the exhibits.

15 During your deliberations, don't tell me
16 how you stand at any particular time. Don't tell
17 me you're eight to four, or ten to two, or eleven
18 to one. I'm not interested, and that's improper.

19 Don't write, when you tell me you arrived
20 at a verdict, "We find the defendant guilty," or
21 "We find the defendant not guilty." Just write,
22 "We have arrived at a verdict."

23 When I receive that note, I'll call you
24 into the courtroom and I'll ask the forelady to
25 stand and ask for your verdict. When you render

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2 it, I'll ask Juror No. 2 whether she agrees, and
3 Juror No. 3 whether he agrees, and so forth, on to
4 Juror No. 12, and if at that time you all agree in
5 open court, then for the first time it becomes a
6 verdict of this case. In other words, the verdict
7 is first announced in open court. I shouldn't
8 have private information.

9 At this time I think I have covered every-
10 thing I wanted to say, but I ask the jury to take
11 leave of the courtroom for just a few moments.
12 Don't start your deliberations yet. I want to have
13 a talk with the lawyers.

14 The jury is excused.

15 (The jury leaves the courtroom.)

16 THE COURT: Mr. Krieger:

17 MR. KRIEGER: If your Honor please, I would
18 respectfully take exception to that portion of
19 your charge where in defining guilt beyond a reason-
20 able doubt you said to the jury that the Government
21 is under no burden to prove the defendant actually
22 guilty. That's the precise word that you used.
23 I do recognize--

24 THE COURT: I said their duty was not to
25 determine whether he was actually guilty. I didn't

1 use burden of proof.

2 MR. KRIEGER: It was in that portion of
3 the charge, your Honor, it was in that portion of
4 the charge.

5 THE COURT: You tell me what I should say.

6 MR. SCHLAM: I have a specific recollection
7 of that--

8 THE COURT: I tried to give a favorable
9 charge by saying even if they think he's actually
10 guilty, that speculation -- the actual guilt is
11 not important. Did the Government prove it?
12 That's a heavier burden.

13 MR. KRIEGER: Your Honor, one of the
14 problems with this kind of procedure is that the
15 lawyer reacts to the way it sounded to him--

16 THE COURT: Do you want to have it read back?

17 MR. KRIEGER: I think I would.

18 (Record read)

19 MR. KRIEGER: Withdraw the exception.

20 Your Honor, I would specifically take
21 exception to the example that the Court used in
22 the Maniero-Nicoli testimony. I specifically
23 assert, your Honor, that the example of the Miguel --
24 who thought of the name Miguel, was not the sum
25 and total of the contradictory testimony.

1 THE COURT: That's all you argued in your
2 summation, wasn't it?

3 MR. KRIEGER: No, who obtained the birth
4 certificate, whether he knew--

5 THE COURT: I'll add that. That's all
6 I remembered. Who obtained the birth certificate?

7 MR. KRIEGER: Whether Maniero was knowingly
8 obtaining false papers.

9 THE COURT: Where was the contradiction?

10 MR. KRIEGER: In those points. Nicoli
11 testified--

12 THE COURT: Who obtained the birth certifi-
13 cate? That I say -- did one say one thing and
14 one the other?

15 MR. KRIEGER: I'll show it to you in my
16 cross.

17 THE COURT: I'll assume it's so.

18 MR. KRIEGER: I cross-examined Maniero from
19 Nicoli's testimony of the transaction.

20 THE COURT: Did you ask Maniero who obtained
21 it?

22 MR. KRIEGER: I asked Maniero -- I asked --
23 I better not just off -- may I get the transcript?

24 THE COURT: If you want me to, I'll say,
25 "And any other contradictory testimony that you

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find."

MR. KRIEGER: Perhaps if Mr. Schlam would agree to this, "as well as the other contradictory testimony."

MR. SCHLAM: I don't agree to that.

THE COURT: You will agree--

MR. SCHLAM: If they find.

THE COURT: Excuse me, in your rebuttal that's the only thing you referred to, who gave the name.

MR. SCHLAM: Exactly.

THE COURT: That's why it stuck in my mind.

MR. SCHLAM: That's what I thought the point was made. I don't remember summation about the birth certificate. I could be wrong, but I don't remember it.

THE COURT: I thought it was a good example on corroboration and contradictory testimony between witnesses, and since you made the point I thought it was a good example to give on assessing credibility.

MR. KRIEGER: "When Miguel DiSantos received that birth certification, you knew, did you not, that Miguel DiSantos was not the person described

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in that birth certificate?" "No."

THE COURT: This is Maniero's.

MR. KRIEGER: The cross of Maniero.

THE COURT: All right.

MR. KRIEGER: "Is it not a fact that the month of March or the month of April, 1967, the person whom you call Miguel DiSantos came to you in Montevideo and asked you to obtain false Uruguayan papers? Answer: No.

"Question: Did that person say to you, 'Obtain false Uruguayan papers for me, and I'll pay you for them'?

"Answer: No.

"Question: Did you say to that person that you would obtain those false papers for him? Yes or no.

"Answer: No.

"Question: Did you discuss with that person what name you would get him papers under?

"Answer: I did not obtain papers under a false name because I first met him as being Miguel DiSantos, so I cannot say that he asked me for false documents.

"Question: Is it not a fact that you told

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him you would obtain false documents under the name of DiSantos and he said, 'I suggest the first name to be Miguel'?

"Answer: No.

"Question: Is it not a fact that the person you say is Miguel DiSantos then gave you a birth date of December 7, 1930, to be put on the papers you were going to obtain for him?

"Answer: No."

THE COURT: I think the difference is slight. In other words, what Maniero testified to was that he didn't know that Miguel DiSantos was a fictitious name and that he understood this was Miguel DiSantos.

MR. KRIEGER: Correct.

THE COURT: And Nicoli testified that he well knew it was all phony.

MR. KRIEGER: And that he went--

THE COURT: I'm willing to say that. I think it's so.

MR. KRIEGER: That he went to Maniero to obtain false papers and Maniero knew he was obtaining false papers for him.

THE COURT: Yes.

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2 MR. SCHLAM: The only point I would make
3 is I don't see the purpose in light of the
4 example your Honor has given to go into more
5 explicit detail on this point. This seems to be
6 getting into the evidence.

7 THE COURT: I don't see the harm. Miguel
8 DiSantos assumed that this was Miguel DiSantos --

9 MR. SCHLAM: Maniero--

10 THE COURT: Maniero assumed that Nicoli
11 was Miguel DiSantos and--

12 MR. SCHLAM: Nicoli said no, gave him the
13 name Miguel.

14 THE COURT: Nicoli said he knew all about it.

15 MR. KRIEGER: He knew all about the reason
16 for going and so forth, yes.

17 Your Honor, the next two exceptions may be
18 my mishearings. I misheard once today. I certainly
19 could mishear a second or third time. I really am
20 not sure what your Honor charged in regard --

21 THE COURT: Tell me the subject matter.

22 MR. KRIEGER: Inference.

23 THE COURT: I said an inference is a con-
24 clusion which the jury may draw and I gave the
25 example of circumstantial evidence, while a

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1
2 presumption is a conclusion which the law requires
3 the jury to make and is overcome only if proof to
4 the contrary is presented beyond a reasonable
5 doubt.

6 MR. KRIEGER: Your Honor, may I repeat the
7 request that I made to the Court at the beginning
8 of this morning's session: that the Court speci-
9 fically instruct the jury that they are free to
10 draw whatever inferences they choose from the
11 evidence that has been adduced here before them.

12 THE COURT: I'll say it again. I don't
13 see any harm in that, but I did say it. I said
14 it slightly differently.

15 MR. KRIEGER: You did say it differently.

16 THE COURT: I don't like to say "free to
17 draw." I assume that they are limited by their
18 own experience and common sense anyway. "Free"
19 means do anything. I don't think that's so.

20 MR. KRIEGER: It's for you to draw whatever
21 inference--

22 THE COURT: I think that's better. It's
23 for you to draw whatever inference.

24 MR. KRIEGER: Such inference as you choose.

25 MR. SCHLAM: Reasonable inference.

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MR. KRIEGER: Such reasonable inference as you feel flows from the evidence.

THE COURT: That's better, I like that better. That you feel flows from the evidence.

MR. KRIEGER: Lastly, your Honor, indicating to the jury the necessity that they deliberate and that they change opinions and change views, I kind of got the impression that they were getting a sort of Allen charge in advance, and I know that your Honor doesn't intend such a charge and you have never charged that kind of thing, which is why I preface the exception -- I may have misheard.

THE COURT: I use this. I tell them that I think both positions are wrong, abandoning their function or refusing to talk to the other jurors which I think it is.

MR. KRIEGER: I think we can let that go. That is it, your Honor.

THE COURT: Do you have any?

MR. SCHLAM: No, your Honor.

THE COURT: Seat the jury.

(The jury enters the jury box.)

THE COURT: In giving an example on one of the guidelines in assessing credibility and that was

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2 to determine whether the testimony of one witness
3 corroborated or contradicted another, I gave the
4 example of Maniero, who I described as a printer
5 and forger of documents, and Nicoli. I said that
6 each one said that the other suggested the name
7 Miguel Do Santos. I didn't intend by that example
8 to limit your discussion or your thinking as to
9 the range of possible contradictions in the testimony.
10 I just gave an example, because my recollection is
11 that Maniero said that he assumed that when Nicoli
12 came to him it was Miguel Dos Santos, while Nicoli
13 testified that he knew that he was coming for
14 forged documents.

15 I also instruct you that the jury may draw
16 such reasonable inferences as you feel flow from
17 the evidence. I thought I charged you on that,
18 but the lawyers feel better if I restate it.

19 At this point I'll have to excuse the alter-
20 nates, Alternates 1 and 2. I thank you for your
21 services. You weren't called upon to serve, but
22 it's a safe procedure to have alternates just in
23 case one of the jurors fall by the wayside.

24 We did order your lunch for you. It will
25 be delivered to my chambers at noontime. I appreciate

1
2 your coming by and picking it up. You're excused
3 now, and if you have your coats and so forth in
4 the jury room, please take them. Alternates are
5 not permitted to deliberate with the jurors.
6 The Congress has a bill at the present time that
7 would permit it, but at the present time the
8 rules are not.

9 (Alternates 1 and 2 are excused.)

10 THE COURT: Will the Clerk please swear
11 in the Marshals.

12 (Two marshals are sworn, Mr. Wemberly and
13 Mr. Armstrong.)

14 THE COURT: Lunch will be delivered at
15 twelve o'clock. I'm going to excuse the lawyers
16 for lunch at twelve o'clock, so if you send a
17 note to me after twelve it will be delayed.
18 When I get a note, incidentally, I discuss it with
19 the lawyers and then I bring you into the court-
20 room. That takes time. Don't think that any
21 delay in answering your note is just my oversight
22 or that I think it's unimportant. I pay attention
23 to notes immediately, but it takes time to respond.

24 The jury is excused for deliberation on
25 the matter. I'm certain that you will consider

1 the matter in accordance with the oath that you
2 originally took. The oath said that you would
3 decide this case and render a true and just
4 verdict, which in turn means that you will decide
5 this case based on the evidence, free of all bias,
6 prejudice or sympathy, in accordance with the law
7 as the Court charged you.

8 The jury is excused.

9 (The jury leaves the courtroom.)

10 THE COURT: Do both lawyers expect to remain
11 in the courtroom? You'll probably go back to your
12 offices.

13 MR. SCHLAM: I'm available on short notice.

14 THE COURT: How about all the exhibits?
15 I would like them available. Are they in the
16 courtroom?

17 MR. SCHLAM: They are in the courtroom, your
18 Honor.

19 MR. KRIEGER: As far as I can recall, the
20 defendant only had three exhibits and they are
21 part of the court file.

22 THE CLERK: I have them.

23 THE COURT: Will you be available?

24 MR. KRIEGER: I'll be here, your Honor.

25 Your Honor, might I just add one other note

MM/ffe¹
lpm/1

(Commences at 1:20 p.m, out of hearing of
the jury as follows:)

THE COURT: I have this note from the jury:

We would like to see the exhibits for the
prosecution and the exhibits for the defense and the
Judge's Charge to the jury re the four points that the
jury should consider in arriving our verdict.

Now I intend to recharge substantially in the
manner that I did and explain what overt act is and
that it may be an overt act by any conspirator.

THE CLERK: Note marked Court Exhibit 4 for
identification.

(So marked.)

THE COURT: Please seat the jury.

(The jury entered the courtroom at 1:25 p.m.)

THE COURT: I have your request asking that
I recharge on the essential elements of the crime.
I might say that when the essential elements of the
crime are submitted to the jury in the form they are
it is so that you may focus on the Government's
burden and see whether they prove those elements
beyond a reasonable doubt, by proof beyond a reasonable
doubt.

First, the Government must prove that the
conspiracy described in the indictment was wilfully

1 formed and existing at or about the time alleged. In
2 other words, that there was such a conspiracy for the
3 purposes alleged in the indictment.

4 Number two, that the accused knowingly and
5 wilfully became a member of that conspiracy. In other
6 words, if you find that he did do certain things that
7 promoted the business of the conspiracy, whether it
8 was conversations, negotiations for the purchase or
9 sale of heroin, and I am not making any determination
10 whether there was any proof of this, but these are all
11 the possibilities that you might consider, whether he
12 drove a car, made a telephone call or had a conversation,
13 that when he performed those acts or participated in
14 those conversations that he was aware that he was part
15 of the business he was conducting of dealing in heroin,
16 importing heroin and dealing in heroin and that what
17 he did he did voluntarily and intentionally, not
18 something that he did carelessly and was not aware of.

19 Number three, that one of the conspirators
20 thereafter knowingly committed an overt act.

21 Now, an overt act would be anything that you
22 could see or hear, it is overt, it is not concealed;
23 and doing it knowingly means that it would be performed
24 with the individual who is doing it being aware of
25 what he was doing, and again not inadvertently.

1 It is not necessary that the Government must
2 prove that this defendant performed one of those overt
3 acts, but it is necessary for the Government to prove
4 that one of the conspirators committed one of the
5 overt acts. In other words, if you find that Nicoli,
6 Chiappe, Gigante, Melchoir, or Nicoli did something
7 to promote that narcotics business, for example,
8 negotiate for the purchase of the narcotics, exchange
9 of the narcotics, transport it, receive payment for
10 it, sell it, conceal it, any of those acts by any of
11 the conspirators, then the Government should have
12 proved one of the overt acts -- he would only have to
13 prove one -- but it had to be an act that was
14 knowingly performed by one of the conspirators and
15 the last element which is related to the third, it
16 is almost the same, it is that act is that it is one
17 that is in the business in the conspiratorial
18 objectives. Those are the four.

19 Now, you asked for all the exhibits and they
20 will be sent to you. The jury is excused.

21 (The jury withdrew from the courtroom at
22 1:30 p.m.)

23 (Out of hearing of the jury.)

24 THE COURT: I purposely avoided refining the
25 overt act by saying that it might be innocent because